



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: OFFICE OF THE COMMISSION SECRETARY *MWD*

DATE: October 13, 2006

SUBJECT: COMMENT: DRAFT AO 2006-31

Transmitted herewith is a late submitted comment by Messrs. Bradley A. Smith, Stephen M. Hoersting, and Paul M. Sherman on behalf of the Center for Competitive Politics regarding the above-captioned matter.

Attachment

Center for Competitive Politics

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2006 OCT 13 A 8:28

October 13, 2006

Ms. Mary Dove
Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

STEPHEN M. HOERSTING
EXECUTIVE DIRECTOR

Mr. Lawrence H. Norton
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comments on AOR 2006-31

Dear Ms. Dove and Mr. Norton:

These comments are filed on behalf of the Center for Competitive Politics in regard to alternative draft Advisory Opinions 2006-31. We write to note our support for the conclusion, reached in Draft A, that the Bob Casey for Pennsylvania Committee (the "Casey Committee") would *not* receive a prohibited in-kind contribution if an incorporated television station charged Mr. Casey the Lowest Unit Charge ("LUC") for advertising time when Mr. Casey is not "entitled" to the LUC under the Communications Act.

We write further to reiterate, as expressed in the Dissenting Opinion in Advisory Opinion 2004-43 (Missouri Broadcasters Association), that satisfaction of the "stand by your ad" disclaimer requirements is irrelevant to the resolution of this issue, because broadcasters have broad statutory discretion to provide candidates with the LUC, even for candidate ads that do not meet the disclaimer requirements.

BCRA amended 315(b) of the Communications Act to provide that a federal candidate "shall not be *entitled*" [emphasis added] to receive the LUC if any of his advertisements have failed to include the required Communications Act Statement. 47 U.S.C. 315(b). Under the plain meaning of these statutory provisions, a candidate who satisfies the Communications Act Statement requirement is guaranteed the LUC as a matter of law. It is equally plain under these statutory provisions that a candidate who fails to include the Communications Act Statement does not have a legal guarantee to receive the LUC. In this circumstance, the statutory language is permissive, making clear that broadcasters have the discretion to provide the LUC to candidates who fail to include the Communications Act Statement, but are not legally required to do so. Therefore, although a candidate may not be "entitled to" the LUC if his ad lacks an

adequate disclaimer, the candidate may nevertheless receive the LUC at the discretion of the broadcaster.

This interpretation is consistent with how the FCC has construed the BCRA amendments to the Communications Act. See footnote 5, Agenda Doc. 05-08 (FCC has interpreted BCRA amendments to allow a station to offer the LUC to a candidate who fails to include an adequate Communications Act Statement, as long as the station treats all Federal candidates in a consistent, non-discriminatory manner). See also *McConnell v. FEC*, 540 U.S. 93, 364 (2003) (Stevens, J., dissenting) (observing that the statute "does not *require* broadcast stations to charge a candidate higher rates for unsigned ads that mention the candidate's opponent. Rather, the provision simply permits stations to charge their normal rates for such ads.") (emphasis in original).

Accordingly, we believe the law plainly permits broadcasters to provide candidates with the LUC, regardless of whether the candidates' ads satisfy the "stand by your ad" disclaimer rule, and we believe the Commission should decide this matter on that basis.

Sincerely,

/s/ Bradley A. Smith

Bradley A. Smith
Chairman, Co-Founder, and Senior Advisor
Center for Competitive Politics

/s/ Stephen M. Hoersting

Stephen M. Hoersting
Executive Director and Co-Founder
Center for Competitive Politics

/s/ Paul M. Sherman

Paul M. Sherman
Associate Director
Center for Competitive Politics